

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,

Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Brief of Plaintiff in Error

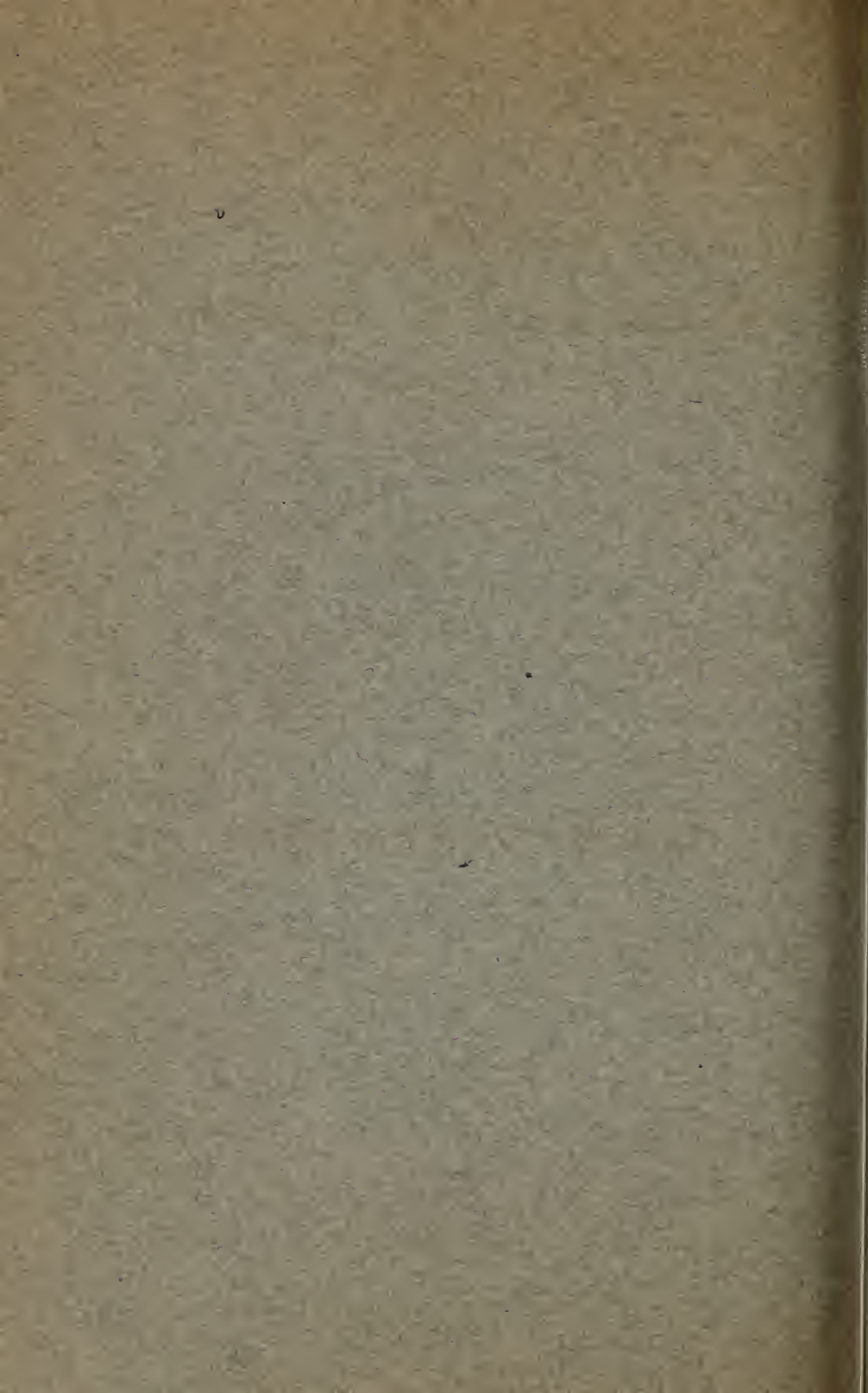
*Upon Appeal from the United States District Court
for the District of Montana.*

WALTER B. MITCHELL,
Attorney for Plaintiff in Error.
624 Rookery Bldg., Spokane, Wash.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,
Plaintiff in error,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Defendants in Error.

Brief of Plaintiff in Error

*Upon Appeal from the United States District Court
for the District of Montana.*

STATEMENT OF CASE.

The defendant, the Leland Company, is a corporation duly organized and existing by virtue of the laws of the State of Montana, and authorized to issue stock of a par value of One Hundred Dollars

per share up to a capital stock of Twenty Thousand Dollars, and doing a general merchandise business in the City of Gardner, State of Montana; The said corporation duly issued Fifty shares of its capital stock to one S. O. Leland on the 20th day of September 1911, fully paid up and non assessable and being certificate number one upon the stock books of said corporation and the one in question in this case, exhibit 5 (Tr. p. 29). At that time the said S. O. Leland was president of said corporation and later he moved to Spokane, Washington, and on the sixth day of March, 1912, sold, assigned, transferred and delivered this certificate of stock to one E. C. Murphy for a valuable consideration.

On or about the 1st of may 1912, the said S. O. Leland entered into an agreement with said E. C. Murphy, wherein and whereby the said S. O. Leland obtained an equitable interest in and to said certificate of stock providing that the S. O. Leland preformed the conditions of said written agreement; thereafter and on the 20th of June, 1912, the said E. C. Murphy assigned his interest in and to said contract to one John E. Murphy, who made frequent demands upon said S. O. Leland to preform the said contract and was finally forced to bring an action in the Superior Court of the State of Washington, in and for the County of Spokane and being a court of record of said State of Washington to determine the rights of the parties to the matter in

question, personal service of process was had upon the said S. O. Leland and Amelia Leland, his wife, in Spokane County, wherein the said defendant were at that time residing, and upon the trial of said cause the Court rendered judgement in favor of the plaintiff and against the said S. O. Leland and wife on the 8th day of April, 1913, and the court further ordered execution to issue directed to the Sheriff of Spokane County to levy upon and seize and take into execution of said judgement any personal property of the said S. O. Leland and Amelia Leland, his wife, that might be found in Spokane County.

Pursuant to said direction of the court and by virtue of said execution the Sheriff of Spokane County, State of Washington, did levy, seize and take into his possession the certificate of Stock for Fifty shares of the Capital Stock of the Leland Company and being the certificate in question herein, and duly advertized and sold at Sheriff sale to the highest bidder all the rights, titles and interests, both legal and equitable, that the said S. O. Leland and Amelia Leland, had in said certificate of stock and upon said sale, the said interests of S. O. Leland and wife was sold to A. Coolin, who was the highest bidder therefore, and the said sheriff executed to said A. Coolin a bill of sale to cover the said interest and delivered the certificate itself to A. Coolin at the same time. (Ex. 10, Tr. p. 35).

A. Coolin having purchased the equitable interests that S. O. Leland had in and to said certificate of stock, proceeded and purchased for a valuable consideration all the legal rights, titles, and interests of E. C. Murphy in and to said certificate of stock, exhibit 6 (Tr. p. 30), and thereafter the said A. Coolin, duly sold, assigned and delivered all the rights, titles, and interests in and to said certificate of stock and the sheriff bill of sale of the interest of S. O. Leland and wife, to the plaintiff herein. Exhibit 7 (Tr. p. 31).

The plaintiff, Walter B. Mitchell, made a formal demand upon the said corporation, the Leland Company, and its president, Frank Linn, and Secretary, Theodore Leland, through his duly authorized agent at the place of business of the said corporation at Gardner, Montana, and presented the said certificate and demanded to have the same transferred upon the books of the corporation in the name of the plaintiff on the 29th day of November, 1914 and the said corporation through the afore-said officers refused to make the transfer or recognize the plaintiff in any way, and therefore the plaintiff brought the present bill of complaint to compel the defendants and its officers to transfer the said stock to him upon the books of the corporation or in case that could not be done to recover the value thereof on or about the 24th day of May, 1915, and the defendant corporation by and through

its officers answered the bill of complaint; thereafter an amended bill of complaint was served and filed and this was also answered and reply made to the answer and upon the trial of this cause the defendants interposed a motion for judgment upon the pleadings and the court overruled the same and it was then and there agreed that the cause of action should be tried upon the original bill of complaint and answer of the defendants and in pursuance of this agreement in open court the said cause was tried as recited in the decree of the trial court. (Tr. p. 58).

Under the pleading upon which the said cause was tried, towit: the original bill of complaint and answer the defendant admitted all the allegation of the said bill of complaint except the fact of the value of the stock and denied the ownership of said certificate to be in the plaintiff but admitted the demand and refusal of the 29th day of November, 1914. (Tr. p. 7).

The trial court held that the plaintiff was not the owner of said stock and dismissed the said cause of action with costs to the plaintiff and therefore this appeal is taken from the ruling of the trial court. (Tr., p. 58).

ASSIGNMENT OF ERROR.

I.

The Court erred in holding the issues to be with defendants.

II.

The Court erred in holding that the title to the stock in question was not established in the plaintiff.

III.

The Court erred in holding that the plaintiff obtained nothing from the assignments of E. C. Murphy and A. Coolin of said certificates and sheriff bill of sale thereof.

IV.

The Court erred in holding that defendants has established any defense to the plaintiff's complaint whatsoever.

V.

The Court erred in prohibiting the complainant from introducing in evidence the Stock Books of the Corporation, for the purpose of showing that no transfer of any certificate of stock was ever issued to Theodore Leland.

VI.

The Court erred in permitting the witness S. O. Leland over the objection of the complainant to testify as follows: "That he had completed his contract with Murphy, deeded certain realty to Murphy and delivered Murphy a check for \$100.00, thereupon Murphy delivered the share certificate in question herein to him, immediately however, Murphy demanded other money from me and upon my refusal to pay, Murphy wrested the share certificate from my

hands, and thereafter on my repeated demand for it he assured me that it was lost" for the reason that even if the above evidence was true it was inadmissable in this cause as it was for the purpose of impeaching a judgment of the Superior Court of Spokane County and State of Washington, which was adjudicated against the said S. O. Leland, in said Court and it was wholly incompetent for a witness to attempt to contradict the said judgment, and this court was wholly without jurisdiction so to do, and for the further reason that it was a total surprise to the plaintiff and so claimed on the trial of said case, and thereby prevented the complainant of meeting any such testimony.

VII.

The Court erred in holding that the purchase of the certificate in question herein at sheriff sale in Spokane, Wash., amounted to nothing.

VIII.

The Court erred in holding that where a certificate of stock in a foreign corporation was owned by a resident of the State of Washington, and that owner had duly assigned the said certificate to another resident of State of Washington for a valuable consideration, and subsequently made a contract with the other resident in which the former owner was to pay a certain sum of money, etc., and upon doing so the said certificate was to be transferred back to him, and the said former owner having failed to so pay as agreed the holder of said certificate brought suit against the said former owner (who was still residing in the State of Washington) to enforce the contract for the

payment of the money and obtained personal service within the State of Washington upon said former owner, and the cause proceeded to judgment on said contract in favor of the holder of said certificate, whereupon the court directed execution to be issued and caused the sheriff to seize the said certificate under the Laws of the State of Washington, providing that any personal property of the judgment debtor within the jurisdiction of the Court may be seized and sold to satisfy the judgment, and the sheriff in pursuance of such execution did actually seize the said certificate in question and take the same into his possession and proceeded to sell according to the laws of the State of Washington, and the sheriff having sold the said certificate and all the rights, titles and interests of the judgment debtor in and to said certificate to the highest bidder at such sale and delivered to said purchaser a bill of sale thereof and also the certificate itself; and the Court erred in holding that under this state of facts the purchaser at such sale derived no title or claim in or to said certificate and no right to have the same transferred to said purchaser on the books of the corporation.

IX.

The court erred in holding that the cause of action for conversion was barred on the original complaint herein.

X.

The Court erred in holding that corporate shares can not be sold on execution save upon lawful levy upon the corporation.

XI.

The Court erred in holding the complainant is entitled to no relief and in not holding that complainant was entitled to the full relief prayed for herein.

XII.

The Court erred in not giving full faith and credit to the proceedings in Spokane, Wash., being the records of a court of record of the State of Washington, in violation of the constitution of the United States, Article 4, Sec. I.

ARGUMENT.

It will be unnecessary to discuss the assignments of error separately or to segregate them to any extent for the reason that most of the facts are conceded and the several assignments of error can be argued together and the court will readily see the application of the points, authorities and arguments herein made to the assigned errors.

It is conceded that S. O. Leland was the rightful owner of the certificate number one for fifty shares of the capital stock of the Leland Company, a corporation of the State of Montana, and being the certificate in question herein, exhibit 5, (Tr., p. 29), on the 6th day of March, 1912, and that the said stock was fully paid and non assessable at that time and that the said S. O. Leland on this day duly sold, assigned, transferred and delivered the said

certificate of stock to E. C. Murphy in Spokane, Washington, and that thereby E. C. Murphy became the owner and holder of said certificate and entitled to have the same transferred to him upon the books of the corporation in said E. C. Murphy's name.

It is further conceded that on or about the 1st of May, 1912, that E. C. Murphy entered into a written contract with S. O. Leland in Spokane, Washington, wherein and whereby the said S. O. Leland obtained an equitable interest in and to said certificate of stock in question herein, and the conditions of said contract was that providing the said S. O. Leland performed his part of said agreement that the said E. C. Murphy would then transfer said stock to him, and the said certificates was held by E. C. Murphy in the meantime.

It is further conceded that on the 20th day of June, 1912, that the said contract was not preformed and the said E. C. Murphy assigned the said contract to John E. Murphy for a valuable consideration, and that the said John E. Murphy was forced to bring suit upon said contract against S. O. Leland and Amelie Leland, his wife, in the Superior Court of the State of Washington, a court of record of said State of Washington, and that personal service was had upon the said S. O. Leland and Amelia Leland and that a personal judgment was rendered against them both on the 8th of april, 1913,

and that the trial court directed execution to be issued to the sheriff of said Spokane County, State of Washington, commanding said sheriff to levy upon, seize and take into execution any personal property found in Spokane County, State of Washington, that belonged to S. O. Leland and Wife, and pursuant to said execution, the said sheriff levied upon said certificate in question herein, seized the same and took the same into his possession and duly sold all the rights, titles and interests both legal and equitable that S. O. Leland and Amelia Leland had in or to said certificate of stock herein and thereby they were foreclosed out of the equitable interest obtained in and to said certificate of stock by reason of the said contract of May 1st, 1912. (Ex. 10, Tr., pp. 35,71, 74).

It is further conceded that neither S. O. Leland or Amelia Leland ever took any appeal or any other proceedings to reverse or alter said judgment or proceedings and that the time for such appeal or other proceedings has long since elapsed and therefore it follows that the said proceedings are a final adjudication of the rights of S. O. Leland and Amelia Leland in and to said matter by a court of record of the State of Washington, and as such, are entitled to full faith and credit of the Courts of the United States.

“Article 4, Sub. I, of the constitution of the United States. Full faith and Credit shall be given in each state to the public acts, re-

ords and judicial proceedings of every other state and the congress may by general laws prescribe the manner in which such acts, and proceedings shall be proved, and the effect thereof."

"As the judgment here relied upon was not a transaction based on any acts mentioned in section 993 of the New York Code, which is the only statute in that state which effects the validity of the judgments based upon gambling transactions it is not void, under the laws of that state, and being entitled under the constitution of the United States to the same faith and credit it would receive in the courts of the State of New York and is not subject to attack in this proceedings."

Carpenter vs. Beal M. Donnell & Co., 222 Fed., 453-461.

Roller vs. Muury, 234 U. S. 738.

It is true that the trial court allowed the said S. O. Leland over the objection of the plaintiff to testify to matter which if true was intended to impeach the said Washington judgment (Tr., p. 76) but in doing so the trial court erred, and in the appeal of this case the court should not take said testimony in consideration, for it is wholly incompetent and immaterial and the said S. O. Leland is estopped from disputing the said judgment or proceedings in any way, and for the further reason, that it, was not one of the issues as framed by the pleadings and could therefore not be considered in this action.

The trial court held that corporate shares could not be sold save by lawful levy upon the corporation, and must have had the view that certificates of stock in a foreign corporation that may be found outside the state they are issued in were subject to the laws of that state governing attachments of domestic stock but the law upon that subject is as follows:

“The delivery of a stock certificate of a corporation to a boni-fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer the same signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers, etc.”

Section 3855, Revised Code of Montana.

“Shares of stock are to be treated as personal property transferable by indorsement and delivery and the rule which most encourages its transfer and gives the certificate as nearly as possible the character of commercial paper will best subserve the public interest.”

National Bank vs. Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

“It is next insisted that the judgment of the snpreme court of New York was void because the plea interposed by the defendant showed that the stock to which the suit in New York related was the stock of a New Jersy corporation, over which the courts of New York could exercise no jurisdiction or control. The rule of law is not disputed that, in a suit com-

menced and prosecuted upon constructive or substituted service of process, the courts of a state or country may lawfully adjudicate on the title to real or personal property situated within its borders, or upon liens or claims against property which is so situated, providing they are authorized to do so by local statutes. *Arnut V. Griggs*, 134 U. S. 316....., It is contended, however, that this rule has no application to the stock of a foreign corporation, that stock certificates are mere evidence of the ownership of stock, and that the stock of a corporation can have no situs outside of the state in which the corporation was created. Speaking, technically, it is true that stock certificates is written evidence of a certain interest in corporate property. The same may be said of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

"In view of the foregoing consideration we are of the opinion that stock certificates are personal property within the purview of the foregoing statute, and that when such certificates are held in pledge, or as collateral, within the state, the court of that state have jurisdiction to establish the existence of a lien thereon, and to enforce the same by directing a sale of the property."

Merritt vs. American Steel Barge Co., 79 Fed. 228, (234,235,236).

“Certificates of Stock in a foreign corporation are personal property, and, when in the hands of third parties within this state, are subject to garnishment”.

Puget Sount Nat. Bank vs. Mather, 62 N. W. 396.

“It is held that certificates of stock in a foreign corporation belonging to a non resident, but held by a resident as pledges, are subject to attachment in a suit against the owner and in this case the court said, certificates of stock are treated by business men as property for all practical purposes, they are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property, they pass by delivery from hand to hand and they are subject of larceny.”

Simpson vs. Jersey City Contracting Co., 58 N. E. 896.

People vs. Grefendagen, 152 N. Y. Supp. 679.

“Coupon railroad bonds belonging to non residents of Maryland are subject to attachment in this State, provided the bonds themselves are located here, whether the railroad that issued the bonds are domiciled in Maryland or elsewhere.”

Francois De Bearn vs. Louis Elis Joseph Henry, et al., 81 Atl. 223.

“Shares of Stock in a foreign corporation are taxable as property to the owner, where he is resident within the commonwealth, although the place of business and the whole property

of the corporation are in another jurisdiction and are treated as personal property."

Bellows vs. Fall Power Co. vs. Commonwealth, 109 N. E. 891.

"Within the provision of the bankruptcy act giving jurisdiction to the court within whose district the alleged bankrupt has property, and it does not have its principal place of business, reside or have its domicile within the United States, corporate stocks and bonds certificates pledged within a district, and balance in an account with a trust company therein, was property within the district."

In Re San Antonio Land and Irrigation Co., 228 Fed. 984.

"Certificates of stock in corporations, properly indorsed and delivered as securities to a trustee with power of sale in case of default in the trust agreement, are property, having the situs at the place of business of the trustee."

Blake vs. Torman Bros. Banking Co., 218 Fed. 264.

"The surrender of a certificate of stock to one not entitled to it, who procures its cancellation and the issuance of a new certificate to himself, amounts to a conversion of the stock."

Haley vs. Haley, 15 Wash. 678, 47 Pac. 23.

"Where Idaho County warrants, the property of an Idaho banking concern, are pledged in New York City prior to the appointment of receiver for the bank in Idaho, they are liable to seizure, in an attachment proceeding *****.

The warrants had a situs in New York, were subject to the same rule as other personal property of like character, and were liable to seizure and sale under writ of attachment."

Thum vs. Pingree, 61 Pac. 18.

"While the corporation is still in legal existence, the stock of the corporation is personal property, and may be transferred as personal property, and the owners of that stock have no interest in the land which can be taken by any process known to the law."

Princeton Min. Co. vs. First Nat. Bank, 19 Pac. 210 (Montana case).

Manifestly from the foregoing authorities shares of stock in a foreign corporation are subject to levy of attachment or execution where as in the instant case the certificates themselves are within the borders of the state wherein the same are attached or execution levied thereon, and further that shares of stock are personal property and the certificates themselves are personal property within the meaning of the statutes and are so held to be for all practical purposes and especially is this so in the State of Montana wherein it holds that shares of stock are personal property and may be transferred as personal property and that it is not necessary to even have the same transferred upon the books of the corporation in order to pass title and therefore under the Montana laws shares of stock are practically negotiable and would be considered the

same as a promissary note and there can be no dispute but what a promissary note can be seized into execution and sold where ever found as personal property.

Since certificates of stock in a foreign corporation are therefore subject to execution or attachment outside the state, wherein it was issued, it naturally follows that the laws of that state which governs the attachment of domestic corporation does not apply for the reason that the courts do not have any jurisdiction to issue any process outside of the state wherein it resides and therefore the seizure must of neccessity be had upon the certificate itself, without reference to the domicile of the corporation, which issued the same and without any process being served upon said foreign corporation and therefore the trial court erred in holding that corperate shares of a foreign corporation cannot be sold on execution save upon lawful levy upon the corporation.

The laws of the State of Montana and Washington as to executions are as follows:

“All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property, both

real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution."

Revised Code of Montana, Section 6821.

"All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution."

Rem. & Bal. Code of the State of Washington, Section 518.

"Equitable interest in land can be sold on execution under the statutes of this state."

Calhoun vs. Leary, 6 Wash. 17, 32 Pac. 1070.

"A set of abstract books are subject to sale on execution under above statute."

Washington Bank of Walla Walla vs. Fidelity Abstract & Security Co., 15 Wash. 487, 46 Pac. 1036.

"Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale. (*Fisk vs. Fowlie*, 58 Cal. 273), and this court had held that under section 5200, Bal Code, which provides that all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution.

Equitable as well as legal estates may be sold on execution.”

State Ex. Rel. Trimble vs. Superior Court,
31 Wash. 445, 72 Pac. 89, 193.

“It is the law of the State of Washington, that where the sheriff sell personal property under execution sale that all that he sell is the real interest of the judgment debtor therein.”

Ranson vs. Wickstrom & Co., 84 Wash., 146
Pac. 1041.

Therefore the purchaser at the execution sale of this certificates in question herein obtained all the rights, titles and interests of S. O. Leland and Amelia Leland and by them purchasing the rights, titles and interests of E. C. Murphy therein, he became the legal and equitable owner of said certificate of stock free and clear from any claim of right, title or interest of the said S. O. Leland or Amelia Leland, his wife, and when he in turn sold transferred and delivered his rights, titles and interests to the plaintiff, the said plaintiff became the owner and holder of said certificate of stock and was entitled to have the same transferred upon the books of the corporation and the trial court erred when he held the contrary as he did upon the trial of this case. (For assignments see Tr., pp. 30, 31.

The trial court further held that the cause of action for conversion as set forth in the original

bill of complaint was barred by the statute of limitations of the State of Montana, Section 6449 of Revised Code, Seb. 3 of 1907, but that statute provides that the limitation is two years, and in the instant case the plaintiff alleged in paragraph five of his bill of complaint:

“That the plaintiff had made frequent demands upon the said defendant corporation for the transfer of said stock and have received no reply whatsoever and finally on the 29th day of November, 1914, the plaintiff through his authorized agent presented the said stock together with the proper assignments hereof to the said corporation at its office in Gardner, Montana, and demanded that it be transferred upon the books of the corporation in the name of the plaintiff, and the defendants through its officers refused to so transfer the same and still refuses to transfer the same to injury and damages of the plaintiff in the value of said stock and in the dividends of the same.”

The defendants admits paragraph 5, in its answer to the bill of complaint and therefore concedes that the demand was made on the 29th day of November, 1914, thus since this action was commenced within seven months after that, and the statutes provides for two years before claim is barred, the trial court erred in holding the same barred. And it is further conceded from the evidence herein that the said stock was worth \$5,825.32 at the time of this demand. (Tr., p. 13).

The trial court in his written memo herein, (Tr., p. 56) gives his decision and bases the same upon the testimony of S. O. Leland, which I have pointed out heretofore in this brief was wrongfully admitted and in that connection, I wish to call this court's attention to the answer of the defendant to the amended complaint herein (Tr., p. 17) where it shows that the defendant claimed that S. O. Leland had obtained a new certificate issued to him in lieu of the one in question here, on the grounds that the old one was lost and that he had sold the new certificate to Theodore Leland, his brother, who was the secretary of the Leland Company and who was one of the officers who refused to issue the stock to the plaintiff herein.

The stock books of the said corporation showed that no such certificate was ever issued and also showed that no share of stock of said Leland Company was ever issued to Theodore Leland (Tr., p. 75) and upon the trial of this cause, the defendants attorney, as soon as they discovered this fact, abandoned the defense and refused to introduce the stock book in evidence, and when the plaintiff offered the same the court sustained the objection of the defendants to the introduction of the stock books, and in this the plaintiff claims the court erred for the stock book was very material to the plaintiff, as it showed a complete frame up on the part of the defendants to deceive the court and an

attempt to present a false defense, and one known to be false, and since the said Theodore Leland never appeared at the trial, but in his place and stead, the said S. O. Leland was called and he, in turn attempts to manufacture a story to defeat and impeach the Washington judgment, and since the answer was false, the testimony of the said S. O. Leland was discredited even if it were admissable in this cause for any purpose whatsoever. S. O. Leland therefore did not claim to own the said certificate in question and was a witness in said cause trying to prove the title was in Theodore Leland, and therefore he is forever estopped, to ever claim the title himself, and since the story told about the transfer to Theodore Leland was false, and Theodore Leland was made a party hereto, as secretary, and made no claim to said stock individually, except what is contained in the answer of the corporation, the corporation could not have been justified in going to the length it did to defeat the plaintiff's title and when it undertook to falsely defeat the title of the plaintiff, it stepped outside the doors of a court of equity and the court erred in holding the issues to be with defendants.

On page 22 of the transcript of record there appears in the Minute entry of the clerk of the District Court the statement that F. O. Leland testified for the plaintiff and that is an error of the clerk as this name should be Frank Linn who

was called by the plaintiff to identify the books of the corporation and it further appears that Theodore Leland was called for the defendants and this is error as it was S. O. Leland, as Theodore Leland was not at the trial at all.

The trial court further erred in holding (even taking for granted that S. O. Leland's testimony was admissible) that the handing of a certificate of stock to another, without any written power of attorney or transfer, passed title to said stock to that other, for the statute of the State of Montana, Section 3855, providing how the title to stock can be passed expressly provides:

“The delivery of a stock certificate of a corporation to a boni-fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer the same signed by the owner of the certificate—”

And the statute providing that a written transfer must be made, and in the instant case, that is lacking, then the title of the stock never passed if S. O. Leland's testimony is true and on cross examination S. O. Leland (Tr., p. 77) admitted that the certificate was presented to him and payment demanded in Washington, before judgment was taken against him, and he refused to make payment, therefore there could not have been any title pass to S. O. Leland at all and the title then was left in E. C. Murphy and the assignment from him did possess

rights and the trial court erred in holding that it did not.

The conclusion of the foregoing therefore is that S. O. Leland parted with the title to the certificate in question when he transferred the same to E. C. Murphy on the 6th day of March, 1912, and never thereafter obtained the title to said stock, the nearest he came to it was when he made the contract and aquired an equitable interest therein providing that he fulfilled the contract and when he failed and refused to so do, as found by the court in the State of Washington, after obtaining jurisdiction over said S. O. Leland and Amelia Leland and also over the certificate itself and the equity of these parties was sold in due manner, then they and each of them were forever foreclosed of any claim, right or title in and to said certificate in question herein, and the title to said certificate by reason of this sale and assignments, became vested in the plaintiff and he was entitled to the transfer of the same upon the books of the corporation and the trial court was in error in not holding that to be the fact and granting judgment in favor of the plaintiff.

I submit that the judgement made and entered in the above entitled cause should be reversed and this court direct the lower court to enter judgment for the plaintiff for the transfer of said stock to the plaintiff and if the value of said stock at the

time of the said judgment being entered is less than the value of it was at the time of demand for transfer, to-wit November 29th, 1914, then and in that case the plaintiff to have judgment for the difference and should the stock not be transferred then the plaintiff should have judgment for the value of it at the time of the demand.

Respectfully submitted.

WALTER B. MITCHELL,
Attorney for Plaintiff in Error.